Ref. No. 383

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

STEPHEN A. LEWIS, Complainant	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 91200104
MCDONALD'S CORPORATION Respondent	)	

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
(October 4, 1991)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Stephen A. Lewis, pro se.
Mary E. Pivec, Esq., for Respondent.

I. BACKGROUND

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Stephen A. Lewis (Lewis or Complainant), a citizen of the United States, charges that McDonald's Corporation (McDonald's or Respondent) unlawfully discriminated against him when it rejected him for employment.

II. PROCEDURAL SUMMARY

On November 30, 1990 the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) received Complainant's charge, alleging that McDonald's denied him employment based on his national origin.

On April 1, 1991, OSC issued a determination letter, informing Complainant that it lacked jurisdiction due to Lewis' failure to file the charge within 180 days of the alleged unfair immigration-related employment practice. 8 U.S.C. §1324b(d)(3). OSC advised Complainant that it would not file a complaint before an administrative law judge on Lewis' behalf, and advised also that he had the right to file his own complaint, within 90 days of receipt of the OSC notification letter.

The charge filed by Lewis with OSC alleged only national origin discrimination. On June 24, 1991, he filed a complaint in the Office of the Chief Administrative Hearing Officer (OCAHO) alleging only citizenship discrimination. On July 1, 1991 OCAHO

issued its Notice of Hearing transmitting a copy of the Complaint to Complainant and Respondent. Respondent timely filed an Answer to the Complaint on August 6, 1991.

Subsequent to filing of the Complaint and Answer, the parties have made further filings, and Complainant initiated discovery procedures.

1. August 8, 1991, Respondent files Motion for Summary Decision, with exhibits and Memorandum Of Points and Authorities in Support.[1]

2. August 12, 1991, Complainant serves written interrogatories on Respondent.

3. August 26, 1991, Respondent files Motion to Postpone The Time For Answer to Complainant's Written Interrogatories.

4. September 3, 1991, Complainant files Motion to Expedite Hearing.

Both Lewis and McDonald's filed responses to each other's pleadings. My Order, dated September 6, 1991, granted Respondent's Motion to Postpone the Time for Answer to Complainant's Written Interrogatories and denied Complainant's Motion to Expedite Hearing.

The function of the summary decision procedure is to avoid an unnecessary trial when pleadings and other materials indicate that there is no genuine issue as to any material fact. U.S. v. Bayley's Quality Seafoods, Inc., 1 OCAHO 338, at 4 (9/17/90); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). A material is one which controls the outcome of the litigation. son v. Liberty Lobby, 477 U.S. 242, 248 (1986).

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ying the motion consist of the of receipt of Notice of Hearing; letter to Respondent; blank copy of cation; affidavits of Douglas Cole, al City McDonald's and Diana Thomas, Donald's Corporate Employees in the 's letters to Respondent of June 3, 1990, September 2, 1990, October 3, Respondent's letters to Complainant of 10, 1990, and October 17, 1990; OSC's letters to Respondent of 1991.

I am mindful that Lewis is not represented by counsel. Nevertheless, he was provided with the rules of practice and procedure of this Office which make clear that a case may be disposed of pursuant to a motion for summary decision. Title 28 C.F.R. §68.36(c) provides that "[t]he Administrative Law Judge may enter a summary decision . . . if the pleadings [and] affidavits . . . show that there is no genuine issue as to any material fact and that a party is entitled to a summary decision." The rules state that a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of such pleading." Rather, the "response must set forth specific facts showing that there is a genuine issue of fact for the hearing." Id. at §68.36(b).

I do not find from the pleadings, read in a light most favorable to the Complainant, that there is a genuine issue as to any material fact. While the discussion below depends upon the facts as set forth in those pleadings, it should be understood that this Decision and Order essentially follows from the failure by Complainant to state a claim which authorizes relief.

III. STATEMENT OF MATERIAL FACTS

On April 4, 1990, Complainant applied for a job at a McDonald's restaurant in Crystal City, Virginia. He filled out an application form, provided a resume, and had an interview with Ms. Jackie Poff (Poff), the First Assistant Manager at the Crystal City McDonald's. Poff offered a job to Complainant. The parties are at issue as to whether or not this employment offer was provisional. Poff instructed Lewis to return the following day to pick up a uniform and to speak to another manager.

On April 5, 1990, Douglas Cole (Cole), Store Manager at the Crystal City McDonald's, interviewed Lewis. The interview
two issues unresolved. First, Cole asked Lewis fo
Security number. Second, Cole asked Lewis t
his resume, regarding work history. Cole
as a McDonald's employee, pending the outc
Cole's inquiry was unsatisfied on both
provide a Social Security number,
avoided getting one to escape feder
employment references did not check o

The parties agree that Lewis cal
1990, and Cole informed him that he would not be offered a position. However, according to Lewis' letters to McDonald's, Cole did not tell Lewis the reason why he was unacceptable to McDonald's. Instead, Lewis alleges that it was not until September 2, 1990 that McDonald's informed him that "employment was denied based on lack of Social Security number." Cole's affidavit, however, recites that Cole rejected Lewis due to his

inadequate work references. Cole claims that the decision not to hire Lewis was based exclusively on this flaw, uninfluenced by failure to obtain a Social Security number. Cole states that he believed Lewis to be a United States citizen. On July 19, 1990 he hired a United States citizen to fill the position for which Lewis interviewed.

IV. DISCUSSION

Title 8 U.S.C. §1324b(d)(3) requires that charges be filed with OSC within 180 days of the alleged discrimination. As construed in IRCA case law, untimely claims are generally barred. Grodzki v. OOCL (USA), Inc., 1 OCAHO 295 (2/13/91); Lundy v. OOCL (USA), Inc., 1 OCAHO 215 (8/8/90). "Agency filing periods are understood to be in the nature of statutes of limitations." Grodzki, 1 OCAHO 295, at 4.

It is a commonplace that the limitations period begins to run at the time of the alleged discriminatory act, provided that act is sufficiently clear to put complainant on notice. For example, an unmistakable notification of termination or rejection of employment marks the commencement of the limitations period. Chardon v. Fernandez, 454 U.S. 6, 7 (1981); Delaware State College v. Ricks, 449 U.S. 250, 258 (1980). OCAHO case law has previously dealt with the question as to when the limitations period begins to run. U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89), appeal docketed, No. 89-9552 (10th Cir. Sept. 25, 1989). In Mesa, where the employer did not disclose for several months its decision not to hire the complainant, the judge held that the cause of action accrued only as of the subsequent date when the employer clearly communicated its decision not to hire the job applicant. Id. at 21.

The case at bar is distinguishable. The parties each recite that during the April 7 telephone conversation, Cole informed Lewis of the decision not to hire him. This is not, therefore, a case such as Mesa where the parties continued in an inconclusive dialogue without the employer having informed the applicant of its decision not to employ him until much later in the relationship. I hold and conclude that the 180 day limitations period runs from the time the applicant is told of the decision whether the rationale is explained then or later.

On April 7, 1990, Lewis was unequivocally informed he would not be working at McDonald's. That is the date, therefore, of the alleged unfair immigration-related employment practice, the date as of which any cause of action accrued. Lewis filed his charge with OSC on November 30, 1990, 237 days later. Because he filed it more than 180 days after he was notified he would not be hired, the charge was time-barred before OSC. A time-barred charge generally bars a complaint before the administrative law judge: "No complaint may be filed respecting any unfair immigration-related

employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." 8 U.S.C §1324b(d)(3). Because I find that the Complainant's claim is time-barred due to his late OSC filing, Respondent is entitled to prevail on its motion for summary decision.

Even had his charge been timely filed, however, Complainant cannot prevail. Having been informed on April 7 that he was not being hired, it does not matter whether Lewis had previously been told he could report to work on April 5, the date of his conversation with Cole. Cole swears Lewis was rejected because his references did not check out, while Lewis is of the opinion it was his failure to provide a Social Security number. Whatever may have been Lewis' expectations, the unrebutted affidavits make clear that he was rejected for one of those reasons neither of which triggers IRCA causes of action.

IRCA prohibits a potential employer from demanding any particular document to satisfy the employment eligibility verification requirements of 8 U.S.C. §1324a. Jones v. DeWitt Nursing Home, 1 OCAHO 189 (6/29/90); U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90), 169 (5/10/90). See also 8 U.S.C. §1324b(a)(6). Here, however, there is no allegation that Complainant was asked to produce his Social Security card in preference to or in lieu of another verification document. There is no suggestion that the IRCA verification process had even begun. Rather, Complainant was asked for his number, not for his card. That request and his response to it are immaterial to the venue of administrative law judges under IRCA.

The public policy against immigration-related discriminatory practices is strengthened by prohibiting a prospective employer from demanding any particular document to satisfy employment eligibility verification requirements, e.g., a Social Security card. That policy is not enhanced, however, by prohibiting an employer from demanding a Social Security number. Nothing in the logic, text or legislative history of IRCA hints that an employer may not require a social security number as a precondition of employment.

Respondent claims that Complainant was rejected for failure of his previous employment references to prove out. I am satisfied that Lewis' lack of documented work experience substantially informed the Respondent's decision to deny him employment. I do not find in the filings any basis for an inference that that claim is pretextual.

Respondent failed to hire Lewis, either because it was unable to obtain confirmation adequate to it of prior employment or because Lewis refused to provide a Social Security number. Neither reason implicates discrimination justiciable under IRCA. It follows that Respondent is entitled to its motion for summary decision.

I recently noted uncertainty whether IRCA covers claims of national origin discrimination on behalf of citizens of the United States who assert American national origin, at least where there is no suggestion that the employer favored citizens of a particular national origin. Lewis v. Ogden Services, OCAHO Case No. 91200105 (9/23/91) n. 2 at 4. Cf., U.S. v. McDonnell Douglas Corporation, 2 OCAHO 351 (7/2/91) (Order Denying Respondent's Motion To Dismiss, Granting Complainant's Motion To Amend, and Denying in Part Respondent's Motion for Sanctions), at 9-10; Lundy v. OOCL, 1 OCAHO 215 (8/8/90), at 2, 6. Here, where citizenship discrimination is alleged, Complainant, a U.S. citizen, does not claim he was denied employment in favor of a foreign applicant. Indeed, the position for which Complainant applied was eventually filled by a U.S. citizen. Complainant has provided not a glimmer of an argument to support either a citizenship or national origin discrimination cause of action.

The question arises whether a complainant in the same procedural posture as Lewis could successfully invoke jurisdiction of an administrative law judge, assuming the claim were not time-barred or otherwise meritless. The statute does not specify whether a charge predicated only on national origin discrimination confers OCAHO jurisdiction over a citizenship discrimination complaint arising from the same facts. The Complaint before OCAHO in this case reflects a deliberate election to allege citizenship discrimination to the exclusion of a national origin claim. In contrast, the charge before OSC reflects a deliberate election to allege national origin discrimination to the exclusion of a citizenship claim.

IRCA requires that charges of discriminatory practices be first filed with the Special Counsel, 8 U.S.C. §1324b(b)(1), as a condition precedent to filing a complaint "before an administrative law judge with respect to such charge," 8 U.S.C. §1324b(d)(2). Nothing in the law or regulatory implementation requires that national origin and citizenship discrimination allegations be mutually exclusive in either a charge or a complaint.[2] Where, however, the practice is alleged as one to the exclusion of the other, it is arguable that the discriminatory practice before the judge may not be the discriminatory practice before and investigated by OSC. In view of the disposition of [illegible], that issue is not, however, resolved [illegible] basis for this Decision and Order.

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2 While OSC's charge form explicitly provides that charging parties may check off both citizenship and national origin claims, OCAHO's complaint format appears to suggest, but not compel, the disjunctive, specifying citizenship "OR" national origin causes of action. OCAHO may want to consider clarifying its format.

V. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings, including affidavits and other documents filed in support, as submitted by the parties. All motions and requests not otherwise disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. That there is no genuine issue as to any material fact.

2. That Complainant's charge was not timely filed in accordance with 8 U.S.C. §1324b(d)(3).

3. That Complainant's citizenship status played no role in the decision by Respondent not to hire him.

4. That summary decision in favor of Respondent is granted pursuant to 28 C.F.R. §68.36(c), and the Complaint is dismissed in accordance with 8 U.S.C, §1324b(g)(3).

This Decision and Order Granting Respondent's Motion for Summary Decision is the final administrative order in this case pursuant to 8 U.S.C. §1324b(g)(1). An appeal of this Decision and Order may be made not later than 60 days after entry "in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business." 8 U.S.C. §1324b(i)(1).

SO ORDERED.

Dated this 4th day of October, 1991

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